ORIGINAL

RECEIVED

SEP 17 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Hyperion Telecommunications, Inc.	)	CCB/CPD No. 96-3
Petition Requesting Forbearance	)	
	)	
Time Warner Communications	)	CCB/CPD No. 96-7
Petition for Forbearance	)	
	)	
Complete Detariffing for	)	
Competitive Access Providers and	)	Docket No. 97-146
Competitive Local Exchange Carriers	)	

REPLY COMMENTS

DOCKET FILE COPY ORIGINAL

MCI Telecommunications Corporation, including its affiliates ("MCI"), respectfully submits these reply comments in response to the Commission's "Notice of Proposed Rulemaking" herein, released June 19, 1997 (FCC 97-219). Therein, the Commission seeks comment on its tentative conclusion that "complete detariffing" -- as distinct from "permissive detariffing" -- would serve the public interest if adopted for application to certain carriers.

In its Comments, MCI stated that the Commission should terminate this proceeding without adopting its mandatory detariffing proposal because it lacks the legal authority to impose a detariffing requirement on common carriers subject to the Communications Act of 1934, as amended. The "forbearance" authority granted the Commission

No. of Copies rec'd 0+4
List ABCDE

under the Telecommunications Act of 1996[1] only provides a capability to the Commission to refrain from enforcing the tariffing requirement established by the Act, *not* from eliminating it altogether.

The 1996 Act does allow the Commission - after certain statutory requirements are met -- to permit carriers to tariff or not to tariff, as they alone choose. And, based upon the record established in this proceeding, it appears that such permissive detariffing is supportable for Competitive Local Exchange Carriers (CLECs) or Competitive Access Providers (CAPs). Accordingly, MCI indicated that the Commission should affirm the legitimacy of a permissive detariffing approach for this class of carriers in this proceeding and decline to adopt a mandatory detariffing approach, which it may not do.

Out of fourteen sets of comments filed, only one party attempts to argue that the Commission possesses the statutory authority to do away altogether with the tariff filing requirement. *See* Comments of the Ad Hoc Telecommunications User Committee, the California Bankers Clearing House Association, the New York Clearing House Association, ABB Business Services, Inc. and the Prudential Insurance Company of America, Aug. 18, 1997, at 2-7. As demonstrated below, those arguments are wholly unpersuasive. In any event, it is apparent that the record in this

---

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).

proceeding does not support the action proposed to be taken by the Commission.

Ad Hoc first contends that the plain meaning of the term "forbear" can be stretched to encompass a grant of authority to order mandatory detariffing. Thus, it argues, the meaning of the term "forbearance" includes "to cease, desist from" and that this can be interpreted in an "active" as well as "passive" sense. To support this view, Ad Hoc cites a single quotation referenced in the Oxford English Dictionary that is more than 250 years old.

Ad Hoc is wrong. The dictionary definition cited does not help its argument; indeed, the "cease or desist" language is part of the fifth definition that reads, in full, "[t]o abstain or refrain from (some action or procedure); to cease, desist from." This definition does not support an interpretation that "to forbear" is the equivalent of "to prohibit." Instead, it fully supports the commonly accepted, plain meaning of the term as discussed in MCI's Comments: "refraining from action," Black's Law Dictionary 329 (5th ed. 1983) and, specifically, in the context of this statute, refraining from enforcing the requirement of Section 203 of the Communications Act.

The "refraining from action" definition is also consistent with that found in other dictionaries as well. *See, e.g.,* The Chambers English Dictionary 553 (1989) ("to abstain from; to avoid voluntarily"); The Cassell Concise

English Dictioinary 520 (1992) ("to refrain or abstain from"); Webster's II New Riverside University Dictionary pg.(1994) (to refrain from); The American Heritage Dictionary (2d. Coll. Ed. 1985) (same); Webster's Third International Dictionary 886 (1981) (same); Random House Dictionary 748 (2d Ed. 1987) (same). Thus, even if an example contained within one of the nine definitions found in a single dictionary could be extended to include "active" refraining, that would not be sufficient to create an amibugity that would allow the Commission to act in contravention of the plain meaning of the statute. *See MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994) at 225-227 (striking down agency interpretation of statute which relied on "one dictionary whose suggested meaning contradicts virtually all others").

Ad Hoc further argues that, despite this, the Commission should look to the history of its attempts to detariff to glean the true scope of its authority to forbear. That, however, is wrong. The plain meaning of the new statute indicates that Congress only gave the Commission authority to refrain from enforcing the mandates of the Act, including Section 203's requirement that carriers *must* file tariffs, not to prohibit them from using tariffs to regulate their business affairs. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product*

Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1982). There thus is no need to look beyond the face of the statute. Even if the Commission were to interpret the term "forbear" in light its past attempts to detariff, that would only confirm that the Commission's power does not extend to the elimination of the tariff-filing requirement but, rather, reaches only its ability to refrain from applying that requirement.

In the 1980s, the Commission issued a series of decisions addressing emerging competition in the long distance marketplace and the regulation of carriers in that market. In its *Fourth Report and Order* in *Competitive Carriers,* 95 FCC 2d 554 (1983), the Commission made Section 203's tariff-filing obligation "permissive" for certain carriers, relying on authority granted it under Section 203 to "modify" the tariff filing requirement. In its *Sixth Report and Order* in *Competitive Carriers*, 99 FCC 2d 1020 (1985) ("*Sixth Report*"), the Commission went further and attempted to prohibit carriers from complying with the tariff-filing obligation under Section 203. The *Sixth Report* was overturned by the DC Circuit in 1985 in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, as exceeding the Commission's legal authority. In the wake of that decision, the Commission's permissive detariffing decision was resuscitated and remained in effect until struck down by the D.C. Circuit in 1992. *See AT&T Corp. v. FCC,* 978 F.2d

727 (D.C. Cir. 1992). In 1994, the Supreme Court affirmed, holding that the power to modify the tariff- filing obligation under the then-existing Communications Act did not include the power to refrain from applying that requirement to all carriers or to a group of carriers. *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218 (1994).

In 1996, the new telecommunications law was enacted. Therein, Congress granted the Commission the authority that the Supreme Court had found lacking, namely, the authority to refrain, or forbear, from applying certain statutory requirements, in particular, the tariff filing requirement, in certain circumstances. Congress could have gone further and given the Commission authority to do what it had attempted in the *Fourth Report and Order* -- to eliminate the tariff-filing requirement altogether -- *but it did not do so*. Rather, it took the more measured step of addressing the Supreme Court's 1994 action by only providing the Commission with the authority at issue in that case.

Ad Hoc's only other argument (at 5-7) is that the Commission and the D.C. Circuit have interpreted other statutory grants of authority to allow for detariffing, and that this grant of authority should be similarly interpreted. That argument is equally unavailing. Whatever the scope of authority granted the Commission or other agencies in other statutes that employ different language, the only relevant question here is the scope of the

authority granted to the Commission in Section 10 of the 1996 Act. Moreover, the only case relied upon by Ad Hoc -- *National Small Shipments Traffic Conf., Inc. v. Civil Aeronautics Board*, 618 F.2d 819 (D.C. Cir. 1980) -- sheds no light on the definition of the term at issue there, "exemption." In that case, the D.C. Circuit found that the Board's authority to exempt airline carriers from a tariff-filing requirement conferred on the Board the authority to order detariffing, but it did so in the context of a concession by all the parties that the language of that statute authorized such an action. *Id.* at 827. Thus, the Court was never called upon to determine whether the Board had properly interpreted the scope of its statutory authority and, accordingly, it said nothing about the scope of forbearance.

The only other authority relied upon by Ad Hoc is this Commission's decision to order mandatory detariffing of commercial mobil radio services ("CMRS"), based on authority granted it to specify that certain provisions of the Telecommunications Act are inapplicable to CMRS providers. That decision, which was never reviewed, relied on entirely different authority than that granted the Commission here. Moreover, even if the Commission's interpretation was legally sound in that case, it does not show that the power granted the Commission here is coextensive. Indeed, MCI submits, the opposite is true. Had Congress intended to

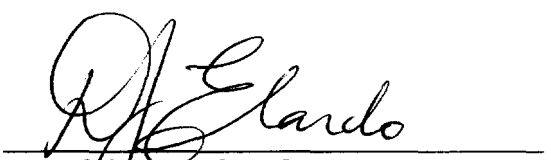
grant the same scope of authority, it presumably would have used the same language. The fact that it did not reinforces the position that the authority granted here is different from -- and quite narrower than -- the authority granted by Congress in the CMRS context.

In any event, the relevant question is not how the Commission has interpreted, or would interpret, the word "forbear" (or any other word) in this or a different context, but what Congress meant in granting the limited authority that it did. There is no indication that Congress intended "forbear" to mean anything other than what it ordinarily means, nor is there any question that, under the plain meaning of that word, the Commission may not eliminate the tariff-filing requirement and prohibit carriers from filing tariffs, if they elect to do so.

For the reasons set forth in MCI's comments and these reply comments, the Commission lacks the requisite legal authority to impose "complete" or mandatory detariffing and, accordingly, it should terminate this proceeding without taking its proposed action.

Respectfully submitted,

MCI TELECOMMUNICATIONS CORPORATION

By: 

Donald J. Elardo

1801 Pennsylvania Avenue, N.W.
Washington, DC 20006
(202) 887-2006

Its Attorney

Dated: September 17, 1997

CERTIFICATE OF SERVICE

I, Vernell V. Garey, hereby certify that the foregoing **"REPLY COMMENTS"**, Files Nos. CCB/CPD No. 96-3; CCB/CPD No. 96-7; CC Docket No. 97-146 was served this 17th day of September, 1997, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

***HAND-DELIVERED**

*International Transcription Service
1231 20th Street, N.W.
Washington, D.C. 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Henry D. Levine
Mary K. O'Connell
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036

Mary McDermott
Linda Kent
Keith Townsend
Hance Haney
United States Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

Robert M. Lynch
Durward D. Dupre
Mary W. Marks
Thomas A. Pajda
SBC Communications Inc.
One Bell Center
Room 3520
St. Louis, MO 63101

Leonard J. Kennedy
Loretta J. Garcia
Christopher D. Libertelli
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036

Roy E. Hoffinger
Mark C. Rosenblum
Roy E. Hoffinger
AT&T Corp.
295 North Maple Avenue
Room 33249J1
Basking Ridge, NJ 07920

Richard J. Metzger
ALTS
1200 19th Street, N.W.
Suite 560
Washington, D.C. 20036

Dana Frix
Morton J. Posner
Swidler & Berlin, Chtd.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Counsel for WinStar Communications, Inc.

Timothy R. Graham
Robert G. Berger
Joseph M. Sandri, Jr.
WinStar Communications, Inc.
1146 19th Street, N.W.
Washington, D.C. 20036

Joseph Kahl
Director of Regulatory Affairs
RCN Telecom Services, Inc.
105 Carnegie Center, 2nd Floor
Princeton, NJ 08540

Phyllis A. Whitten
SWIDLER & BERLIN, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
Counsel for GST Telecom, Inc.

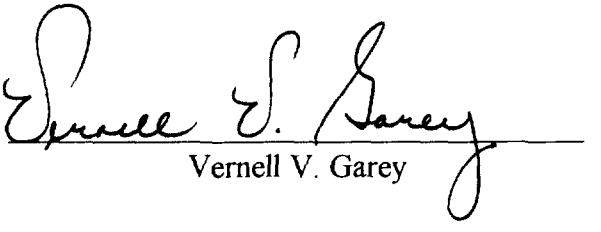
Kathy L. Shobert
Director, Federal Affairs
General Communications, Inc.
901 15th Street, N.W., Suite 900
Washington, D.C. 20005

Riley M. Murphy
Charles H.N. Kallenbach
American Communications
Services, Inc.
131 National Business Parkway
Suite 100
Annapolis Junction, MD 20701

Brad E. Mutschelknaus
Marieann Z. Machinda
Kelley Drye & Warren LLP
1200 19th Street, Suite 500
Washington, D.C. 20036

Michael J. Shortley, III
Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Jonathan E. Canis
Lisa Leibow
Kelley Drye & Warren LLP
1200 19th Street, Suite 500
Washington, D.C. 20036
Attorneys for Intermedia Communications, Inc.



Vernell V. Garey